



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. E 277 OF 2019**

**DIRECTLINE ASSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SAMUEL KAMAU MACHARIA.....1<sup>ST</sup> DEFENDANT**

**ROYAL MEDIA SERVICES LIMITED.....2<sup>ND</sup> DEFENDANT**

**ROYAL CREDIT LIMITED.....3<sup>RD</sup> DEFENDANT**

**PURITY GATHONI MACHARIA.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff in this cause is Directline Assurance Company Limited (hereinafter Directline). It has sued 1<sup>st</sup> to 4<sup>th</sup> defendants who are all its shareholders. It is important to state that this case is closely related to HCCC 278 of 2019 involving the parties herein and other shareholders of Directline.

2. Directline by Chamber Summons dated 9<sup>th</sup> September 2019 seeks orders of injunction pending the hearing and determination of an intended arbitration between Directline shareholders.

3. The affidavit in support of the application is sworn by Terry Wajenje the Managing Director and Chief Executive Officer (CEO) of Directline. The deponent has been the CEO of Directline from 2008. This is what the CEO had to say in her affidavit, about Directline.

***(i) The plaintiff is the country's first niche underwriter to solely focus on motor vehicle insurance and is the single largest insurer of commercial vehicle in East and Central Africa. It was established in 1998 by among others, the late John Macharia and has over the years risen from small insurance company to the market leader in public service vehicles (PSV) Insurance.***

***(ii) The Plaintiff currently commands over 60% market share of PSV Insurance.***

***(iii) The Plaintiff therefore plays a major role in the insurance and public transport industries and it is in the interest of these industries and the public in general that the plaintiff stays afloat and continues to offer the very vital services it offers.***

4. The deponent further stated that dispute had arisen among the shareholders of Directline and with its directors. The dispute relates to management and control of Directline. According to the deponent the defendants had attempted unlawful take control of Directline.

5. The deponent referred to background of disputes, of defendant's shareholding in Directline some dating back to the year 2005 which culminated with the 1<sup>st</sup> defendant, in the absence of CEO, holding a meeting, on 19<sup>th</sup> August, 2019, with members of staff of Directline. The 1<sup>st</sup> defendant informed the staff that Directline CEO was leaving her post. According to the CEO this announcement was done without her resignation or termination of her services by the Board of Directors of Directline. Further that the 1<sup>st</sup> defendant took to the offices of Directline two persons, namely Bashir Mburu and Anthony Macharia, who are not employees of Directline and who were to monitor the activities of members of staff of Directline. This is what the CEO said of the two individuals:

***“The said Anthony Macharia and Bashir Mburu have been disrupting the plaintiff's operations by issuing instructions to the plaintiff's staff, demanding access to company records. They even obstructed an inspection that was being undertaken by the Insurance Regulatory Authority (IRA). This obstruction may expose the plaintiff to sanctions by the IRA.”***

6. After the annual general meeting, which was due to take place on 30<sup>th</sup> August 2019, was cancelled the 1<sup>st</sup> defendant wrote a letter to the CEO suspending her as managing director and CEO of Directline and required her to show cause why her services should not be terminated.

7. Further that the 1<sup>st</sup> defendant by letter of 30<sup>th</sup> August 2019 wrote to the chairman of the Board of directors of Directline asking him to resign from his position.

8. Further that on 3<sup>rd</sup> September 2019 at 6.50 a.m the 1<sup>st</sup> defendant's agents, namely Anthony Macharia in the company of others broke into the office of Directline.

9. After setting out other actions undertaken by the 1<sup>st</sup> defendant, whereby the 1<sup>st</sup> defendant appointed Mr. Isaac Ngaru as CEO of Directline, the deponent stated that:

***“There is a serious risk that the defendants will interfere with the operation of the plaintiff's bank accounts that are used for settling claims.”***

10. The deponent further stated that IRA, inter alia, had responded to 1<sup>st</sup> defendant's letter of 30<sup>th</sup> August 2019 by stating that his own appointment as chairman of the board contravened Section 27A of the Insurance Act.

11. As a consequence of the actions of the 1<sup>st</sup> defendant the CEO stated she had been unable to access her office which is presently occupied by the 1<sup>st</sup> defendant.

12. The 1<sup>st</sup> defendant opposed the application by his affidavit sworn on 16<sup>th</sup> September 2019. He deponed that the court lacked jurisdiction to grant the orders sought by the plaintiff because what the plaintiff was seeking, according to the 1<sup>st</sup> defendant, was enforcement of an illegal contract. The 1<sup>st</sup> defendant deponed that Directline had, since 2011, maintained two contradictory and mutually exclusive list of shareholder's list. That the shareholding list was based on purported board resolution. That the amendment of the Memorandum and Articles of Association, carried out on 22<sup>nd</sup> May 2017 was done while Directline was contravening Section 23 (4) of the Insurance Act. That the defendants were not informed of Directline financial management.

13. The 1<sup>st</sup> defendant further deponed that this suit was founded on a cause of action which is based on the plaintiff's own wrong doing. Further that the CEO had continued to issue cheques even after her suspension.

14. The 1<sup>st</sup> defendant stated that, contrary to what the CEO deponed, Mr. Bashir Mburu, and Mr. Anthony Macharia had developed cordial working relationship with staff of Directline.

## **ANALYSIS**

15. Directline has moved the court under section 7 of the Arbitration Act which provides:

### *7. Interim measures by court*

*(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.*

*(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.*

16. In considering the provisions of that section the Court of Appeal in the case **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR** had this to say:

*“An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter.*

*To illustrate the point Article 26-3 of the UNICTRAL Arbitration rules states:-*

***“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of the agreement.”***

*Section 7 of the Arbitration Act is modeled on this.....*

*Interim measures of protection in arbitration take different forms and it would be unwise to regard the categories of interim measures as being in any sense closed (say restricted to injunctions for example) and what is suitable must turn or depend on the facts of each case before the Court or the tribunal – such interim measures include, measures relating to preservation of evidence, measures aimed at preserving the status quo measures intended to provide security for costs and injunctions. Under our system of*

the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are:-

1. The existence of an arbitration agreement.
2. Whether the subject matter of arbitration is under threat.
3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application?
4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties?"

17. From the above it is obvious that the categories of seeking interim orders of protection are not closed, as they are in respect to the other ordinary applications for injunction under Order 40 of the Civil Procedure Rules. See *Geila v Cassman Brown* (1973). It follows that the defendants plea that the plaintiff had failed to meet the conditions of granting mandatory injunction fails.

18. The defendants also argued that the Memorandum and Articles of Association of Directline were amended when there was contravention of the Insurance Act. As a consequence the defendants citing the Court of Appeal case **MAPIS INVESTMENTS (K) LTD V KENYA RAILWAY CORPORATION (2006) eKLR** argued that this court cannot recognise the arbitration clause which is contained in the Articles of Association amended while there was the alleged contravention of the Insurance Act.

19. The arbitration clause is in Article 82 of the Article of Association of Directline. It provides that any dispute, controversy or claim arising or relating to the Articles of Association, or the interpretation, breach or validity shall, if it cannot be resolved by negotiation, be submitted to arbitration.

20. To argue, as the defendants does, that the arbitration clause is unenforceable is not supported by statute, specifically section 17 of the Arbitration Act. The Court of Appeal in the SAFARICOM case (supra) had this to say in that regard:

*“Although the English Arbitration Act 1996 is not exactly modeled on the Model law unlike our Act, I fully endorse the principles as outlined in the **CHANNEL CASE** (supra) because they are in line with the arbitral tribunal’s jurisdiction as set out in **section 17** of the Arbitration Act of Kenya. The section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national court to rule on the jurisdiction of an arbitral tribunal except by way of appeal under **section 17(6)** of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contrary to the provisions of **section 17** and in particular violated the principle known as “Competence/Competence” which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is “**Competence to decide upon its competence**” and as expressed elsewhere in this ruling in German it is “**Kompetenz/Kompetenz**” and in French it is “**Competence de la Competence**”*

21. The arbitral Tribunal has jurisdiction to determine the legality or otherwise of the arbitral clause.

22. The defendants in their opposition to the application made many overtures for the court to entertain the merits of this case, but the one answer I will give is this: that it is the preserve of the arbitrator to consider merits or otherwise of the claim before him.

23. In considering what the Court of Appeal stated in Safaricom Case (supra) what ought to be considered in an application, such as the one before me, whether indeed there is in existence an arbitration agreement and the subject matter, that is Directline, in view of the actions taken by the 1<sup>st</sup> defendant is under threat.

## **CONCLUSION**

24. It is because of the above findings that I grant the following orders:

(a) Pending the Commencement of the arbitration process an injunction is hereby issued restraining the defendants, whether by themselves, their employees, directors, representatives and/or agent or whoever on their behalf, from suspending, removing or appointing the Chief Executive Officer, the Chairman of the Board of Directors, other officers, any director and/or employee of Directline Assurance Company Limited and any suspension, removal or appointed of the Chief Executive Officer, the Chairman of the Board of Directors, other officers, any director and/or employee of Directline Assurance Company Limited that have been done by the defendants are hereby nullified and vacated.

(b) Pending the commencement of the arbitration process an injunction is hereby issued restraining the defendants whether by themselves, their employees, directors, officers, representative and/or agent or whoever on their behalf from submitting the names of Samuel Kamau Macharia, Julius Orange, Bashir Mburu and Evans Nyaga or any other person to the Insurance Regulatory Authority, and/or any other regulatory body or the Registrar of Companies for approval as appointees to hold any position whatsoever in Directline Assurance Company Limited and any such submissions of names of appointees that have been made by the defendants, they are hereby nullified/vacated and they shall not be acted upon.

(c) Pending the commencement of the arbitration process an injunction is hereby issued restraining the defendants whether by themselves, their employees, directors, officers, representatives and/or agent or whoever on their behalf from in any manner whatsoever interfering with the operations of the Directline Assurance Company Limited, including but not limited to:

(i) Issuing memoranda to the staff of Directline Assurance Company Limited.

(ii) Directing the staff of Directline Assurance Company Limited to supply documents relating to the operations of Directline Assurance Company Limited save for any documents the defendants may by law or pursuant to the plaintiff's memorandum and Articles of Association be entitled to as shareholders.

(d) Pending the commencement of the arbitration process the decisions, resolutions and directives by the defendants to Directline Assurance Company Limited, its Board of Directors, Directors, employees contained in the following letters, memoranda and document, that is:

(i) The letter dated 30<sup>th</sup> August 2019 addressed to CEO of Directline Assurance Company Limited, Ms Terry Wajenje and signed by the 1<sup>st</sup> defendant Mr. Samuel Kamau Macharia.

(ii) The letter dated 30<sup>th</sup> August 2019 addressed to the Chairman of Board of Directors of Directline Assurance Company, Mr. Kevin McCourt, and signed by the 1<sup>st</sup> defendant, Mr. Samuel Kamau Macharia.

(iii) The Resolution of the defendants dated 2<sup>nd</sup> September 2019 and signed by the 1<sup>st</sup> defendant, Mr Samuel Kamau Macharia.

(iv) Various memos dated 3<sup>rd</sup> September 2019 and signed by the 1<sup>st</sup> defendant Mr Samuel Kamau Macharia; they all are hereby suspended nullified and vacated.

(e) Pending the commencement of the arbitration proceedings any actions, decisions and resolutions of the defendants or any of their employees, directors, officers, agents and/or representatives or whoever, purportedly on behalf of Directline Assurance Company Limited they are hereby vacated, nullified and suspended.

(f) The costs of the Chamber Summons dated 9<sup>th</sup> September 2019 shall abide with the outcome of the arbitration proceedings.

**DATED, SIGNED and DELIVERED** at NAIROBI this 15<sup>th</sup> day of October, 2019.

**MARY KASANGO**

**JUDGE**

**Judgment read in open court in the presence of**

Sophie ..... Court clerk.

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANTS